Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of GCB Communications, Inc. d/b/a Pacific Communications and Lake Country Communications, Inc. for Declaratory Ruling	)	WC Docket No. 11-141

REPLY COMMENTS OF U.S. SOUTH

U.S. South Communications, Inc. ("U.S. South"), by its attorney and pursuant to the Wireline Competition Bureau's *Public Notice,*[1] submits these reply comments on the declaratory ruling sought by the payphone service provider ("PSP") petitioners, GCB Communications, Inc. and Lake Country Communications, Inc. (collectively "Petitioners"), in the captioned proceeding.

INTRODUCTION

As noted previously, U.S. South was the prevailing party in the federal court litigation giving rise to this primary jurisdiction referral. While the PSP petitioners have conspicuously not commented or otherwise responded to U.S. South's formal Opposition to their declaratory ruling request (timely filed on August 31, 2011),[2] the payphone industry trade association APCC and its collection arm, APCC Services, Inc., did comment.

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[1] *Wireline Competition Bureau Seeks Comment On Petition To Clarify Payphone Service Providers' Responsibilities With Respect To the Transmission Of Payphone-Specific Coding Digits,* Public Notice, WC Docket No. 11-141, DA 11-1450 (rel. Aug. 31, 2011).

[2] Opposition of U.S. South To Petition for Declaratory Ruling, WC Docket No. 11-141 (filed Aug. 31, 2011) ("Opposition"). *See GCB Comms., Inc. v. U.S. South Comms., Inc.,* No. 07-cv-02054-SRB (D. Ariz. Oct. 30, 2009), *rev'd,* 2011 U.S. App. LEXIS 8882, 53 Comm. Reg. (P&F) ¶ 176 (9th Cir. April 29, 2011), *rehearing denied,* Order, No. 09-17646 (9th Cir. May 23,

The Commission should reject APCC's self-serving comments because they are legally meritless, historically biased and faulty, and make factual assertions that are both unsubstantiated and incredible. Representing a rapidly dying industry overtaken by immense technological change, APCC is merely seeking to shift the cost of complying with the Commission's payphone compensation plan — and of collection disputes with IXCs — away from its financially strained members. That may be good trade association politics, but represents an inadequate and impermissible rationale for Commission interpretation of its rules or for lawful FCC action under Section 276 of the Communications Act of 1934 (47 U.S.C. § 276).

DISCUSSION

The APCC comments epitomize the last-gasp of a plainly biased telecom industry sector looking for special dispensation, namely interpretation of little-known FCC regulations that favor its own parochial interests over all others involved in calls made from public payphones in the United States. Under their approach, a PSP would merely have to show up in federal court, claim that calls were initiated from its payphones and, *without any evidence,* collect the federal default rate of $0.494 (49.4 cents) per call. Given recent revelations that PSPs have fraudulently been utilizing autodialers to "spoof" payphone ANIs and concoct bogus claims for compensation,[3] this would be a terrible result as a matter of public policy.

2011). A copy of the Court of Appeals' slip opinion was annexed as Exhibit 1 to the Opposition; it is also available at http://www.ca9.uscourts gov/datastore/opinions/2011/04/29/09-17646.pdf. Contrary to APCC's characterization, the Opposition was filed pursuant to the Commission's procedural rules and was not "early comments in the form of an opposition." APCC Comments at 10; *see* 47 C.F.R. §§ 1.2, 1.45(b).

[3] *See, e.g., Pay Phone Owner Pleads Guilty to $4M in Robocalls,* Forbes, Sept. 20, 2011, http://www.forbes.com/feeds/ap/2011/09/20/general-us-pay-phone-scheme_8690723.html. Until recent regulations were promulgated by the Commission in response to congressional legislation, inserting a false originating ANI into a calling string in order to make it appear that calls are placed from a payphone was not a violation of the Communications Act. U.S. South points this out not only as a matter of context, but also because APCC falsely claims that "*both parties*

But this proceeding, of course, does not call upon or permit the Commission to fashion national public policy for payphones. What it does is ask that the FCC rule on whether its myriad, oft-repeated orders in 1996-2003 stating in various linguistic versions that LECs *and* PSPs "must transmit" payphone-specific Flex-ANI coding digits with payphone-originated calls have any meaning.[4] If the Commission decides, more than a decade later, that IXCs are required to remit per-call compensation to PSPs without regard to whether Flex-ANI was transmitted, it will fundamentally upset the balanced, fair regime the agency adopted when earlier Commissioners and FCC staff wrestled with one of the more complex provisions of the 1996 Telecom Act.

Just as a Completing Carrier can be liable for a failure by its underlying facilities-based carrier, so too must a PSP be at risk — as between itself and the Completing Carrier — if its serving LEC improperly fails to correctly identify the PSP's payphone calls. Opposition at 10, 21-22. As the Commission stated contemporaneously in 2003, rejecting out-of-hand APCC's passionate argument that payphone compensation responsibilities should fall entirely on facilities-based IXCs (like here in order to regulatory avoid obligations for its members, artific-

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agreed [the calls] had originated from GCB's payphones." APCC comments at 2 (emphasis in original). That is incorrect. U.S. South did not so agree; we were unable economically to contest the point with evidence at trial because the cost of investigating and proving possible fraud vastly exceeded the small (approximately $18,000) amount in dispute.

[4] *See* Opposition at Section I(A) for a full discussion of the Commission's many reiterations of the requirement that LECs and PSPs "transmit" coding digits with each payphone-originated call. As the Bureau explained in 1998: "We clarify in this order that *the transmission of payphone-specific coding digits by LECs through Flex-ANI is required* unless a LEC hard-codes into all of its switches all the payphone-specific coding digits discussed herein as necessary for identifying payphones calls for per-call compensation." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5001 at ¶ 2 n.9 (1998) (emphasis supplied).

ially reduce PSP collection costs and shift them to the payors), the agency has a duty to be fair *to all sides* on these issues.[5]

A. The APCC Position Is Legally Flawed

APCC characteristically insists that the petition should be granted because of what it calls "the Communications Act['s] unequivocal requirement that PSPs be paid DAC [dial-around compensation] for 'each and every completed call' from their payphones." APCC Comments at 2, citing 47 U.S.C. § 276(b)(1)(A). That of course is nonsense. The Act required the Commission to craft a plan, using the "each and every" call language as its policy objective, but itself gives no rights to PSPs. The only compensation requirement is that which is in effect, currently at issue in this proceeding, pursuant to the Commission's implementing regulations and orders. Citing the precatory language of the statute does APCC and its PSP members no good. It certainly is not a sufficient ground for this Commission in 2011 to upset what earlier agency officials, far more versed in this rather esoteric area, wrote and ordered on the subject.

APCC also contends that the FCC has "been absolutely explicit" that payphone Flex-ANI codes need not accompany each call. APCC Comments at 3. U.S. South demonstrated the meritlesssness of that contention in its Opposition (Opposition at 11-17) and APCC offers nothing new. Its current argument that the Commission cannot decide the instant petition adverse to the PSPs without initiating an APA rulemaking (APCC Comments at 19-21*),* is equally baseless. Interpretation of agency rules does not require an NPRM, and both regulations and orders can be clarified even, unlike here, in adjudicatory proceedings.

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[5] As the Commission emphasized then, "[s]ection 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Fifth Order on Reconsideration, 17 FCC Rcd. 21274, 21302-03 ¶ 82 (2002). "Section 276 does not permit the Commission to lawfully 'require one company to bear another one's expenses.'" *Id.* (citing *Illinois Public Telecomms. Assn. v. FCC,* 117 F.3d 555, 556 (D.C. Cir. 1997).

The requirement for transmission of payphone-specific identifiers was included from *the very first* 1996 Commission payphone compensation Order under Section 276. Opposition at 11-12. It is therefore sophistry to pretend, as APCC asserts, that because the implementing regulations formally state that a Completing Carrier "shall compensate" a PSP, APCC Comments at 19, the Commission's contemporaneous and repeated rulings on the scope and practical operation of that requirement are immaterial. At the very least, as the Ninth Circuit explained in rejecting U.S. South's argument that the district court erred by not deferring sufficiently to this Commission, the case is about "construing the language of [Commission] orders,"[6] not establishing new law. Administrative procedure has always permitted that to be done without initiating a further rulemaking.

Finally, APCC disingenuously claims the Ninth Circuit has somehow created a new regulatory requirement making PSPs responsible for Flex-ANI implementation. APCC Comments at 2, 4-5. That is wrong because all the court of appeals held was that an IXC cannot be found to have violated the requirement to establish an "accurate" call tracking system if it permissibly relies on Flex-ANI as the basis to identify payphone calls. Opposition at 4-8; *see* 47 C.F.R. § 64.1310(a)(1). Since the Commission has equally made clear that 100%, perfect success is not required in tracking calls,[7] holding an IXC solely responsible — as a matter of strict liability, *i.e.,* without any possible legal or factual defense — for an unexplained failure of Flex-ANI transmission conflicts directly with the rights and burdens assigned to Completing Carriers under the payphone compensation plan.

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[6] *GCB,* slip op. at 5588.

[7] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19994 ¶ 39 n.109 (2003).

B. The APCC Position Is Historically Biased and Immaterial

APCC's arguments are premised on a revisionist history of payphone regulation, one in which the FCC acted to accept the payphone industry's pleas by imposing all of the costs and burdens of the per-call compensation plan on LECs and IXCs. But that is hardly the case. As just one example, APCC maintained less than a decade ago that switch-based resellers ("SBRs") were not the "primary economic beneficiary" of payphone calls terminated by their intermediate facilities-based wholesale carriers, and that both information access and public policy equity hence required that the Commission impose the Section 276 payment obligation on the first carrier in the call path. The FCC rejected that approach in 2003.[8] The reality, therefore, is that the relative lack of information on the part of PSPs has been one factor, but by no means a dispositive one, in the Commission's compensation plan decisions.[9]

This historical bias plagues all of the APCC points. The association admits that "there are so many possible points of failure, and the performance of FLEX-ANI is subject to even minute to minute fluctuation." APCC Comments at 7. That is demonstrably correct, as the litigation between Petitioners and U.S. South illustrated. Yet what APCC draws from that uncontested fact is that its PSP members should once again be shielded from any responsibility because of limited information. *Id.* at 8-9. That is where it errs. The FCC has utilized relative lack of information as the basis for requiring disclosures and reports from LECs and IXCs (including ANI lists,

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[8] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Fifth Order on Reconsideration, 17 FCC Rcd. 21274, 21302 (2002).

[9] APCC also remarkably sought per-call compensation for calls from prison payphones under circumstances in which the payphone operators were already receiving contractual revenues from the designated 0+ operator services provider. The FCC easily and correctly rejected such double-dipping.

intermediate carrier reports and tracking system audit certifications),[10] but it has never allocated compensation liability or legal responsibility solely on the basis of such equitable considerations. More importantly, whatever equities may exist today as among LECs, IXCs. SBRs and PSPs have absolutely no relevance to the Commission's interpretation of its decisions from a decade ago. Equity may have a bearing in establishing new policies under the Act; it cannot be a factor in an administrative agency's legal interpretation or construction of its prior orders.

C. The APCC Position Is Based On Unsubstantiated and Incredible Factual Assertions

APCC's comments assert a number of factual contentions regarding Flex-ANI and the respective functions, incentives and cooperation of the various telecom entities involved in payphone traffic. The Commission should disregard these claims.

First, APCC says it makes the factual representations only to show whether a system in which PSPs must ensure Flex-ANI transmission actually occurs is "workable." APCC Comments at 6. That is perhaps a rationale for revising the Commission's rules and orders, going forward, but not for interpreting them. As U.S. South explained, without contradiction, the Flex-ANI system was imposed by this Commission precisely so that IXCs would for the first time have a payphone-specific identifier in call records with which to track payphone calls. Opposition at 17-21. Since the claimed obligation imposed by the court of appeals is fallacious (*supra* at 5), APCC's target strawman in any event makes its workability argument irrelevant, as well as factually suspect. In any event, as U.S. South has explained, making Flex-ANI irrelevant to a carrier's payment obligations would strand significant network investment and make a

[10] The payphone association pejoratively dismisses these myriad requirements as only "a partial effort to address the issue." APCC Comments at 8.

nullity of the Commission's command for a payphone-specific tracking mechanism. Opposition at 18-20.

It is also not credible. For instance, while APCC claims LECs refuse to disclose whether Flex-ANI is working and that intermediate carriers refuse to provide information voluntarily, APCC Comments at 7, the actual fact is that, in this very case, U.S. South and its intermediate carrier provided reams and gigabytes of information to all the parties prior to trial, including massive archives of call records. That the PSPs could not find anything amiss in that call data on which to assign fault for the Flex-ANI failure to U.S. South or Level 3 is no excuse for claiming incorrectly that "experience" shows PSPs lack a workable alternative to strict payment liability for IXCs. APCC Comments at 6.

Second, APCC maintains that PSPs have no knowledge of whether Flex-ANI is operating properly because LECs are not specifically required to report on that aspect of their system. APCC Comments at 9. But the answer is simple; PSPs know whether FLEX-ANI is broken because if it fails, their payments from carriers will stop or drop precipitously. Opposition at 20-21. As GCB itself asserted at trial in this case, a low completion rate from a Completing Carrier — one of the specific data sets for reporting which PSP aggregators routinely calculate and provide to their payphone operator clients — is a "red flag" for a problem with an IXC. APCC admits this (APCC Comments at 11), but proceeds to claim that because PSPs are "very small enterprises," *id.,* their size should make it immaterial whether they have the tools to identify Flex-ANI problems.

To the contrary, that GCB and Lake Country did nothing for years despite that red flag warning in this case is not, and should not properly become, the responsibility of U.S. South or other IXCs. Many SBRs are also relatively small enterprises. The fact, epitomized here, that

PSPs can sue in federal court as a matter of Communications Act law for very small sums gives PSPs substantial financial leverage. GCB's lawyers filed a half dozen DAC cases against different carriers simultaneously, all of which except U.S. South's settled because the cost of defense vastly exceeded the compensation claimed. APCC's latest lament that carriers must pay per-call compensation "regardless" of whether Flex-ANI is sent or received, and with no showing *of any error or fault* on the part of the Completing Carrier, is just another in this series of efforts inappropriately to transfer the costs and risks of payphone compensation, and its collection, away from an industry whose utility is now vastly exceeded — even for the poorest Americans — by ubiquitous wireless phones.

CONCLUSION

The Commission should deny the petition for declaratory ruling and respond to the federal courts' primary jurisdiction referral by (a) reiterating that payphone-specific Flex-ANI must be transmitted with each payphone-originated call, and (b) declaring that an interexchange carrier may permissibly rely on Flex-ANI to identify payphone calls consistent with the long-standing mandate that carriers deploy an "accurate" payphone call-tracking system under Section 64.1310(a)(1) of its per-call payphone compensation rules.

Respectfully submitted,

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